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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 482

ESTATE OF JEROME J. HANAUER, LEWIS L. STRAUSS AND CARRIE H. HANAUER, EXECUTORS, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 95–106) is unreported. The opinion of the Circuit Court of Appeals (R. 124–129) is reported in 149 F. 2d 857.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 5, 1945. (R. 129.) The petition for a writ of certiorari was filed on October 3, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial

Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether there is evidence to support the Tax Court's finding that reciprocal trusts created by decedent and his wife were created in consideration of each other so that, for purposes of the estate tax, decedent is to be treated as the grantor of the trust created by his wife.

STATUTE INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 302 [as amended by Section 404, Revenue Act of 1934, c. 277, 48 Stat. 680].—The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—
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> * * * * *
>
> (c) [As amended by the Revenue Act of 1932, c. 209, 47 Stat. 169, Sec. 803 (a)].—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference

to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *

(d) (1) [As amended by Section 401, Revenue Act of 1934, *supra*].—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth.

STATEMENT

The facts as found by the Tax Court may be summarized as follows:

The decedent, Jerome J. Hanauer, died testate, a resident of New York State, on September 3, 1938, at the age of 63 years. He left surviving him, as the sole members of his immediate family, his widow, Carrie H. Hanauer, age 61, his daugh-

ter, Alice H. Strauss, age 35, his son-in-law, Lewis L. Strauss, age 42, and his grandson, Lewis Hanauer Strauss, age 14. (R. 96.)

On June 3, 1932, and in the State of New York, decedent executed a trust agreement (R. 24–36) whereby he transferred certain securities in trust. The trustees were his wife and his son-in-law, Lewis L. Strauss. The trust provided for the payment of the net income to the decedent's wife during her lifetime and for the distribution of the income and corpus after her death in accordance with provisions which are set forth in detail in the instrument (R. 24–27), but do not appear to be material here. It was also provided that the trust could be amended, altered, revised, or terminated, in whole or in part, upon the consent of decedent's wife and daughter. (R. 96–97.)

The value of the properties so settled in trust by the decedent on June 3, 1932, was, on that date, $751,132.45. Some three years later, on November 8, 1935, he added to the trust securities of the value of $151,648.33. (R. 97.)

On the same day upon which the decedent created his trust, June 3, 1932, his wife created a similar trust which was identical in all respects with the one executed by the decedent, except that her name appeared in all places appropriate, as the grantor, and decedent's name appeared in all places as a beneficiary and trustee, just as the wife's name appeared in the trust agreement

which decedent executed. Thus with respect to the trust created by his wife, the decedent was entitled to the income for life and had the power, in conjunction with the daughter, to amend, alter, revise, or terminate, in whole or in part. The provisions of each trust were "crossed", the trusts being identical except for the substitution of the names of decedent and his wife to make the trusts "cross". (R. 97–98.)

The value of the properties so settled in trust by the decedent's wife was $723,740.96. (R. 98–99.) She did not select the properties which were put in trust under her trust agreement. Decedent and Lewis L. Strauss selected the securities which were put into her trust. (R. 100.)

The net worth of the decedent in 1932 was five million dollars, and in each of the five years preceding the creation of her trust his wife was worth not less than $1,250,000. (R. 99.)

The trust agreements were prepared by Morris L. Ernst, a cousin of Carrie H. Hanauer, who was her and decedent's personal attorney. In the fall of 1931, decedent discussed his idea of creating a trust with Ernst, and Ernst mentioned to Carrie H. Hanauer that her husband was contemplating a trust. Again, in the spring of 1932, decedent discussed the trust with Ernst and, in particular, the clauses of a trust. Ernst also had conversations with Carrie H. Hanauer. Ernst

advised both that if they intended creating trusts they should not delay because gift tax legislation was pending in Congress and probably would be enacted. Ernst submitted drafts of clauses to decedent. As Carrie H. Hanauer was not business wise, Ernst obtained her instructions and told her that he was going to put the same technical clauses in her trust as in decedent's trust. When the trust agreements had been drawn up in Ernst's office, he sent them to decedent, leaving in each agreement a blank page, as a schedule, on which were to be written the descriptions of the properties to be conveyed in trust under each agreement. (R. 99–100.)

In 1931, decedent was a senior partner in the firm of Kuhn, Loeb & Company, and had been a partner since 1912. Among the other partners were Mortimer L. Schiff and decedent's son-in-law, Lewis L. Strauss. (R. 96.) In the autumn of 1931 decedent served notice on his partners that he intended to retire from the partnership. He retired at the end of 1932. He discussed with his wife, his family, and his attorney, problems affecting the management and protection of his personal fortune and that of his wife at or about the time he served his partners with notice of his intended retirement. (R. 100.)

Carrie H. Hanauer had substantial assets of her own. She relied upon the judgment of her hus-

band and son-in-law in making investments. She maintained an account with Kuhn, Loeb & Company, which carried her investments. Also she had a cash account with that firm. She had accounts in other banks. (R. 100.)

In the autumn of 1931 she knew, through Ernst's statements to her, that decedent thought of creating a trust. In 1932 she knew that decedent intended creating a trust in her favor. She asked Ernst if it would be a good idea for her to create a trust too, and Ernst said he thought it would be a good thing for her to do. Carrie H. Hanauer created her trust because her husband, the decedent, created his trust. (R. 100.)

The decedent and his wife did not consider the creation of their respective trusts and did not execute them independently and apart. Each created his respective trust in consideration of the other. (R. 101.)

The Commissioner of Internal Revenue determined that there should be included in decedent's gross estate the value of the property in the trust created by his wife (R. 13, 101), and was sustained by the Tax Court (R. 95–107). The Circuit Court of Appeals affirmed. (R. 124–129.)

ARGUMENT

1. This case presents only a question of fact, with respect to which the Tax Court's finding is conclusive, since it is supported by ample evi-

dence. As has been many times held[1] if the reciprocal trusts created by the decedent and his wife were in fact created in consideration of each other, there is no question that the decedent is to be treated for purposes of the estate tax as the grantor of the trust created by his wife. And, as petitioners concede (Pet. 9–10), if he is so treated Sections 302 (c) and (d) (1), *supra,* require the inclusion of that property in his gross estate.

The Tax Court has made here the explicit finding that each of the trusts was created "in consideration of the other". (R. 101, 106.) That finding was certainly a permissible one upon this record in view of the facts that (a) the trusts were created on the same day; (b) they were drafted by the same attorney; (c) the value of the property placed under each trust was substantially the same ($751,132.45 in the decedent's trust and $723,740.96 in his wife's trust); (d) the trusts were literally and truly "cross trusts" creating identical rights and powers in each spouse, and (e) although decedent had earlier taken up the idea of creating a trust he did not

[1] E. g., *Lehman* v. *Commissioner*, 109 F. 2d 99 (C. C. A. 2d), certiorari denied, 310 U. S. 637; *Cole's Estate* v. *Commissioner*, 140 F. 2d 636 (C. C. A. 8th); *Estate of Oliver* v. *Commissioner*, 148 F. 2d 210 (C. C. A. 3d), affirming *per curiam* the memorandum decision of the Tax Court of April 28, 1944 (1944 P–H T. C. Memorandum Decisions, par. 44,–138); *Estate of Eckhardt* v. *Commissioner*, 5 T. C. No. 80.

do so until his wife's trust was ready for execution. The Circuit Court of Appeals therefore properly affirmed the Tax Court's decision.

The essence of the opinion in the Circuit Court of Appeals is simply that the Tax Court's finding was conclusive, since it was supported by ample substantial evidence. The court stated that it understood the Tax Court's findings to mean (R. 126) "that the estates created by decedent's trust served as a *quid pro quo* for the trust which he caused his wife to make"; that "There was abundant evidence to support those findings, much conceded and much adduced by the petitioners themselves"; and that (R. 127–128) "it was within the power of the trier of fact to make its own conclusion from the basic facts."

It is thus plain that the Circuit Court of Appeals did not reject the Tax Court's view of the case (cf. Pet. 10–12) and has not suggested any novel "psychological test" of "causation" (cf. Pet. 19–21). There can scarcely be any room for doubt upon this point in view of the court's concluding statement that (R. 129) "Since here we have valid findings which bring the case within the scope of the *Lehman* doctrine, the order of the Tax Court was plainly right." The sentence in the opinion to the effect that the court's holding was (R. 128) not to "be taken as an intimation that the evidence here would support a finding that the wife's transfer was effective to bring

about the decedent's transfer,—a finding not essential to support the result reached here," appears in its setting to amount to no more than a statement that there was no necessity to determine then whether or how much [2] of the property placed in trust by the decedent would be includible in the wife's estate when she should die.

2. With respect to the Tax Court's resolution of the factual issue the question is not of course whether the evidence *required* a conclusion that the trusts here involved were created in consideration of each other (cf. Pet. 13, 15, 17–18) or even whether it would support a finding in favor of the party bearing the burden of proof (cf. Pet. 23, fn. 1). For here, the Commissioner's determination being presumptively correct, the burden of proof was upon petitioners (*Welch* v. *Helvering,* 290 U. S. 111), and the sole issue is whether the Tax Court's finding was a *permissible* one. Nor is there any inconsistency between the Tax Court's resolution of the factual issue here and its findings upon different evidence in *McLean* v. *Commissioner,* 41 B. T. A. 1266, affirmed, 127 F. 2d 942 (C. C. A. 5th), and *Lindsay* v. *Commissioner,* 2 T. C. 174. In the *Lindsay* case, for example, it was shown that the husband did not even know that his wife had created a trust (2

[2] It will be recalled that on November 8, 1935, some three years after the two trusts had been created, the decedent had made an additional transfer to the trust which he had created of property worth $151,648.33. (R. 97.)

T. C. 178). In the *McLean* case, involving a gift tax, the Commissioner had determined that the trusts had *not* been created in consideration of each other and the taxpayers had undertaken to show that they were. The Tax Court's holding was simply that upon the evidence there adduced the taxpayers had not carried their burden (41 B. T. A., p. 1267), and the affirmance by the Circuit Court of Appeals was, as here, based upon the ground that the Tax Court's resolution of the factual issue was final.

There is thus no basis for the petitioners' charge (Pet. 22–23) that a different substantive rule of law prevails in gift tax cases from that which prevails in estate tax cases. The decisions merely illustrate that where the evidence is different, different findings of fact may result.

CONCLUSION

The decision below is correct and there is no conflict or any other reason for further review. The petition should be denied.

Respectfully submitted.

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